Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1575

SAMUEL DEMILIA, President of the Patrolmen's Benevolent Association of the City of New York and all other Police Officers of the City of New York similarly situated,

Petitioner,

—against—

THE STATE OF NEW YORK, LOUIS LEFKOWITZ, Attorney General, HUGH CAREY, Governor of the State of New York, MAYOR EDWARD KOCH, on behalf of the City of New York, CHAIRMAN ARVID ANDERSON, on behalf of the Office of Collective Bargaining,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No.

SAMUEL DEMILIA, President of the Patrolmen's Benevolent Association of the City of New York and all other Police Officers of the City of New York similarly situated,

Petitioner,

—against—

THE STATE OF NEW YORK, LOUIS LEFKOWITZ, Attorney General, HUGH CAREY, Governor of the State of New York, MAYOR EDWARD KOCH, on behalf of the City of New York, CHAIRMAN ARVID ANDERSON, on behalf of the Office of Collective Bargaining,

Respondents.

P U PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

To the Honorable Justices of the Supreme Courts:

Petitioner, Samuel DeMilia, prays that a writ of certiorari issue to review the decision of the Court of Appeals of the State of New York entered in this proceeding on January 10, 1980.

Opinions Below

The opinion of the Court of Appeals of the State of New York, not yet reported, appears in Appendix A annexed hereto. The opinion of the Appellate Division of the State of New York, First Judicial Department, reported in 421 N.Y.S. 2d 70, appears in appendix B annexed hereto. The opinion of the Supreme Court, New York County, reported in 96 Misc. 2d 77, 412 N.Y.S. 2d 953, appears in appendix C annexed hereto.

Jurisdiction of the Court

The decree of the Court of Appeals of the State of New York, was entered on January 8, 1980. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1257 (3).

Question Presented

Whether Section 23.3, chapter 201 of the Laws of 1978, is repugnant to the 14th Amendment of the Constitution of the United States since it places petitioner in a different position than that of any other brother police organization throughout the State of New York.

Statute Involved

Chapter 201, Sub Section 23.3, Laws of 1978, Amended Section 7 of the New York State Financial Emergency Act for the City of New York, Chapter 868, Laws of 1975, by adding thereto subsection 3.

Statement of the Case

In 1975, the Legislature of the State of New York, declared that a financial emergency existed in the City of New York (L. 1975, Ch. 868§1). Subsequent to the aforesaid declaration of emergency, the Legislature enacted the New York State Financial Emergency Act for the City of New York ("F.E.A."), pursuant to the police and emergency powers of the State Constitution. This followed a determination that the City of New York was on the brink on financial bankruptcy threatening the very existence of the municipal government as an entity and thereby creating a danger to the safety and welfare of the citizenry therein.

The Emergency Financial Control Board ("EFCB"), was the center piece of the FEA. The purpose of the EFCB was to exercise ultimate supervisory control over the fiscal affairs of the City, while preserving as far as possible, traditional aspects of municipal affairs with regard to local programs and expenditures (L. 1975, Ch. 868§1). Other provisions of the F.E.A., *inter alia*, regulated the investment of funds by pension and retirement systems for public employees and imposed a freeze upon all municipal employees.

In 1978, the Legislature declared that the financial emergency continued to exist within the City of New York and enacted Bill No. 13025 as Chapter 201 of the Laws

of 1978 (L. 1978, Ch. 201§10-40; A.-122-130) which amended the F.E.A. The amendments, *inter alia,* continue the EFCB originally established pursuant to the FEA while placing other stringent controls and supervisory mechanisms over the citie's fiscal policies for the purpose of enhancing the future marketability of City obligations, and restoring the credit worthiness of municipal securities. Section 23.3 of Chapter 201 makes New York City's financial ability to pay as defined in Financial Emergency Act, as the financial ability of the City to pay increased wages or fringe benefits without increasing the level of city taxes existing at the time of the commencing of the impasse proceeding.

On June 5, 1978, the Petitioners commenced an action on behalf of himself and all other police officers of the City of New York similarly situated, for a Declaratory Judgment that provisions of Chapter 201 inclusive of Section 23, *et seq,* thereof, were invalid and unconstitutional and for injunctive relief relating thereto. The action was commenced by service of a Summons and Verified Complaint. An Order to Show Cause was signed by the Honorable Justice Edward Greenfield on June 5, 1978, after denying petitioner's request for a temporary restraining order and striking same from plaintiff's Order to Show Cause. Petitioner's prayer for relief requested:

> "that an Order be made and entered herein restraining and enjoining the defendants from arbitrarily and capriciously, in violation of the Constitution of the United States, the 14th Amendment thereof . . . from effecting the provisions of Assembly Bill Number 13025 as enacted on the 2nd day of June, 1978."

On December 11, 1978, the Honorable Justice Hortense W. Gabel, Supreme Court, County of New York, denied

petitioner's Complaint for Declaratory Judgment, Motion for Injunctive Relief and treating defendant's motion as that for Summary Judgment held, *inter alia* the provisions of Chapter 201 of the Laws of 1978, inclusive of Section 23 thereof, valid and constitutional in all respects.

On January 9, 1979, Notice of Entry of the aforesaid final Order and Judgment, was directed by Judge Gabel. Petitioners served a Notice of Appeal and Pre-Argument Statement on or about the same date.

All parties presented oral argument before the Appellate Division, First Department, on October 4, 1979. The Appellate Division, First Department unanimously ordered that the judgment of Special Term, Part I, Gabel, J., be

> "modified, on the law, to the extent of reversing so much thereof as denied the defendant's motion to dismiss the complaint granted and the complaint dismissed, without costs and without disbursements, and without prejudice to any action or processing as plaintiffs may be advised".

Petitioners file a motion for leave to appeal, and on January 8, 1980, the Court of Appeals of the State of New York denied petitioner's motion.

CERTIORARI SHOULD BE GRANTED FOR THE FOLLOWING REASONS

I.

The subject Statute is repugnant to the 14th Amendment of the United States Constitution.

The 14th Amendment of the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 23.3, Chapter 201 of the laws of 1978 states as follows:

> "For purposes of this subdivision, financial ability to pay shall mean the financial ability of the city or covered organization to pay the cost of any increase in wages or fringe benefits without requiring an increase in the level of city taxes existing at the time of the commencement of a proceeding under paragraphs (a) [an impasse panel] (c) [Office of Collective Bargaining] (d) [all other unions not covered by Chapter 54 of the New York City Administrative Code.] . . ."

The above bill was aimed specifically at New York City Police Officers to the exclusion of other Police Departments in the State. The above subdivision 3(h) of Section 7 of the Financial Emergency Act has as its criteria, the financial ability of the City to pay the cost of any increase in wages or fringe benefits granted to the New York City Police Officers. This subdivision makes the New York City Police Officers unique in their position to bargain and arbitrate their contract.

This uniqueness adopted by the Legislature has in essence singled out a specific labor organization, to wit: the PBA, and placed unconstitutional restrictions upon it that are not "endured" outside New York City.

The equal protection clause of the United States will be circumvented when the New York City Police union reaches impasse and is awarded a similar raise as other unions. The award could be denied because the aforementioned section forbids the raising of any taxes to pay said award.

State action within the 14th Amendment refers to exertions of State power in all forms and when the effect of that action is to deny rights subject to protection, it is the obligation of the United States Supreme Court to enforce the constitutional commands. *Shelly* v. *Kramer, Mich & MO.*, 1948 68 S. Ct. 8361, 334 U.S. 1, 92 L. Ed. 1161.

The PBA has liabilities imposed upon it which no other Police Department in the State can likewise boast.

CONCLUSION

For the foregoing reasons, the writ of Certiorari, should be granted.

Respectfully submitted,

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APPENDIX A

Decision of Court of Appeals of the State of New York (N.Y. Law Journal, January 10, 1980)

1. Mo. No. 1216

SAMUEL DEMILIA, President of the Patrolmen's Benevolent Association of the City of New York et al.,

Appellants,

vs.

THE STATE OF NEW YORK, et al.,

Respondents.

Motion for leave to appeal denied with twenty dollars costs and necessary reproduction disbursements.

APPENDIX B

Opinion of the Appellate Division of the State of New York, First Judicial Department

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on October 30, 1979

Present—

HON. THEODORE R. KUPFERMAN, *Justice Presiding*
LEONARD H. SANDLER
MYLES J. LANE
ARTHUR MARKEWICH
VINCENT A. LUPIANO *Justices*

SAMUEL DEMILIA, President of the Patrolmen's Benevolent Association of the City of New York and all other Police Officers of the City of New York similarly situated,

Plaintiffs-Appellants,

—against—

THE STATE OF NEW YORK, LOUIS LEFKOWITZ, Attorney General, HUGH CAREY, Governor of the State of New York, MAYOR EDWARD KOCH, on behalf of the City of New York, CHAIRMAN ARVID ANDERSON, on behalf of the Office of Collective Bargaining,

Defendants-Respondents.

Appendix B

An appeal having been taken to this Court by the plaintiffs-appellants from a judgment of the Supreme Court, New York County (Gabel, J.) entered on January 11, 1979, *inter alia,* declaring Chapter 201 of the Laws of 1979 valid and constitutional in all respects, and said appeal having been argued by Mr. Eugene N. Axelrod of counsel for the appellants, and by Mr. Robert Hammer, of counsel for the State respondents, by Mr. L. Kevin Sheridan, of counsel for respondent Koch, and by Mr. Burton C. Agata, of counsel for respondent Anderson; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

It is unanimously ordered that the judgment so appealed from be and the same is hereby modified, on the law, to the extent of reversing so much thereof as denied the defendants' motion to dismiss the complaint and rendered declaratory relief, the defendants' motion to dismiss the complaint granted and the complaint dismissed, without costs and without disbursements, and without prejudice to any action or proceeding as plaintiffs may be advised.

Enter

JOSEPH J. LUCCHI
Clerk

Judgment, Supreme Court, New York County (Gabel, J.), entered January 11, 1979, which, *inter alia,* declared Chapter 201 of the Laws of 1979 valid and constitutional in all respects, modified, on the law, to the extent of reversing so much thereof as denied the defendants' motion to dismiss the complaint and rendered declaratory relief, the defendants' motion to dismiss the complaint is granted and the complaint is dismissed, without costs and disbursements, and without prejudice to any action or proceeding as plaintiffs may be advised.

Appendix B

Chapter 201 (L. 1978) which, *inter alia,* amends the Financial Emergency Act of 1975, provides in pertinent part relevant to impasse procedures in the collective bargaining process, that New York City's "financial ability to pay" be considered (*See,* Section 23 of Chapter 201, Laws of 1978). The plaintiffs' present labor contract with the City terminates on June 30, 1980 and provides in part that each party has "the right to re-open the economic provisions of any negotiated *successor* agreement . . . if a court of last resort . . . determines that the impasse provisions of . . . Section 23, Paragraph 3, a through h, is unconstitutional" (Emphasis supplied). Negotiations have not commenced on a contract for the succeeding two-year period. There is no pending Board of Collective Bargaining review of an impasse panel proceeding and no pending judicial review of such proceeding involving the provisions of Section 23.

In the absence of a ripe on-going collective bargaining process involving the parties, it is clear that at this point there may never be resort to Section 23 as the parties may voluntarily enter into a new labor agreement without exhausting the collective bargaining negotiations and confronting an impasse.

> "A genuine dispute—or 'actual controversy as the later adopted federal declaratory judgment provision calls it—is necessary for a declaratory action as of any other. CPLR 3001 also says that the controversy must be 'justiciable,' . . . in this context the word is . . . used . . . to confirm that there must be an actual controversy" (Siegel: New York Practice Section 436, p. 578).

All concur.

Order filed.

APPENDIX C

Opinion of the Supreme Court, New York County

SUPREME COURT, NEW YORK COUNTY

SPECIAL TERM, PART I

SAMUEL DEMILIA, President of the Patrolmen's Benevolent Association of the City of New York and all other Police Officers of the City of New York similarly situated,

Plaintiffs,

—against—

THE STATE OF NEW YORK, LOUIS LEFKOWITZ, Attorney General, HUGH CAREY, Governor of the State of New York, MAYOR EDWARD KOCH, on behalf of the City of New York, CHAIRMAN ARVID ANDERSON, on behalf of the Office of Collective Bargaining,

Defendants.

GABEL, J.:

Motions 15 and 16 of September 19, 1978 are consolidated for disposition.

In this matter, the Court is called upon to determine whether Chapter 201 of the Laws of 1978 including Section 23.3(a-h) is unconstitutional on several grounds al-

leged by plaintiff (PBA). Chapter 201 amends the New York State Financial Emergency Act for the City of New York (Chapter 865, Laws of 1975; FEA).

Section 23.3 (a-h) imposes a new limitation on the bargaining and arbitration provisions of the New York City Collective Bargaining Law (Chapter 54, Administrative Code 1173-71.0[c]) based on the City's ability to pay wage increases and other benefits.

The Court must also determine whether §23.3 (a-h), by allegedly removing "arbitration as an available tool" (Petition, paragraph 17), has eliminated the ban on public employee strikes contained in the Taylor Law (Civil Service Law §209, 209A, 210).*

CHAPTER 201 AND THE LEGISLATIVE FINDINGS

The FEA was enacted in 1975 and is predicated on legislative findings that a financial emergency existed in The City and that the emergency constituted a clear and present danger to the health, safety and welfare of its inhabitants.

FEA provided for the creation of an Emergency Finance Control Board to review, control and supervise the financial managment of the City. Other provisions regulated the investment of funds by pension and retire-

* The matter is before the Court by way of a motion by plaintiff for an injunction and an order in the nature of a declaratory judgment. The defendants move to dismiss on the ground that plaintiff fails to state a cause of action and for an order declaring the legislation to be constitutional.

Although plaintiff's motion is supported by what is denoted as a petition, the Court treats the matter as an action for a declaratory judgment (CPLR 103(c) there being no objection to personal jurisdiction raised by any of the parties.

ment systems for public employees and imposed a wage freeze on City employees. FEA's constitutionality has been sustained.

In Chapter 201, the Legislature found that the financial emergency continued to exist in the City (§1.a) and that "It is a matter of substantial and imperative state concern that the City not fail to meet its obligations. . .". Chapter 201, continued and supplemented the provisions of FEA in order to obtain federal guarantees of City obligations and return the City to fiscal responsibility. The measure, inter alia, repealed the wage freeze (§35).

Existence of the facts found by the Legislature is presumed, although subject to rebuttal (United States v. Carolene Products Co., 304 U.S. 144, 152, Lincoln Building Associates v. Barr, 1 N Y 2d 413, 415). And these legislative findings as to a "public emergency" are entitled to "great weight" (East New York Savings Bank v. Hahn, 293 N Y 622, 627, aff'd 326 U.S. 230; see Block v. Hirsh, 256 U.S. 135, 154-155.)

Preliminarily, this Court finds that Chapter 201 is in consonance with the police powers of the State. (Wein v. Beame, 43 N Y 2d 326, 331 (1978); Public Interest v. Steingut, 40 N Y 2d 250, 257 (1976); Montgomery v. Daniels, 38 N Y 2d 41, 54 (1975).]

PROVISIONS OF §23.3(a-h)

Section 23.3(a-h) enacts new subdivisions 3 through 6 of Section 7 of the FEA. Basically, it provides that any report or recommendation of an impasse panel established pursuant to the New York City Collective Bargaining Law (Admin. Code §1173.07.0[c]) or finding of the Col-

lective Bargaining Board which provides for increases in wages or fringe benefits to City employees must, in addition to other specified criteria, "consider and give substantial weight" to the *City's* "financial ability to pay" such increases. "Financial ability to pay" is defined as "the financial ability of the City . . . to pay the cost of any increase . . . without requiring an increase in the level of City taxes existing at the time of the commencement" of impasse proceedings under §23.3 a, c and d. Section 23.3(a-h) is concerned, of course, with *all* City taxes and is not limited to real estate taxes (emphasis added).

THE RESTRICTION ON TAX INCREASES

The plaintiff PBA argues that §23.3(a-h) violates Article VIII, Section 10 of the State Constitution which states that the City shall not tax real estate in any fiscal year in an amount exceeding 2½% of the average full valuation of taxable real estate of the City.

Thus, according to the plaintiff, if at the time that impasse proceedings were initiated, the City was taxing real estate at less than 2½%, §23.3(a-h) would preclude the City from "asserting its constitutionally guaranteed prerogative" to tax up to 2.5% (plaintiff's memorandum at p. 7) in order to provide increases.

There is no merit to plaintiff's argument. It ignores the clear language in the last paragraph of Article VIII Section 10 of the Constitution which states:

> "Nothing contained in this section shall be deemed to restrict the powers granted to the legislature by other provisions of this constitution *to further restrict* the powers of any county, city, town, village or school district to levy taxes of real estate." (emphasis added).

This language, coupled with the absence of any restriction upon the power of the Legislature to fix a lower limit of permissible taxation (other than a limitation relating to debt service), empowered the Legislature to enact Section 23.3(a-h).

FEA is also valid under Article VIII, Section 12 of the New York State Constitution which provides that "it is the duty of the Legislature to restrict the power of taxation, assessment, borrowing money, contracting indebtedness and loaning the credit of counties, towns, cities and villages so as to prevent abuses in taxation assessments . . ." (See Flushing National Bank v. MAC, 40 N Y 2d 731 (1976); Kelly v. Merry, 262 N Y 151, 160 (1933); Bank of Rome v. Village of Rome, 18 N Y 38 (1858).

Moreover, plaintiff's argument is limited to real estate taxes, yet §23.3 (a-h) is not so limited. The Legislature has "absolute discretion" to impose, amend or repeal any kind of local taxes (except for real estate taxes to pay debt service) [Gautier v. Ditmar, 204 N Y 20, 27 (1912); Quick v. MAC, 41 N Y 2d 644 (1977).]

It should also be noted that Section 23.3 (a-h) does not restrict the City from levying taxes up to the permissible tax limit established by the Constitution. There is nothing in the Act which precludes City officials from voluntarily increasing the level of taxation within the constitutional limit if they believe it wise or appropriate to do so, as long as the City has given consideration to its financial ability to pay.

Appendix C

As Judge Fuchsberg noted in his concurring opinion in City of Amsterdam v. Helsby, 37 N Y 2d 19, 41 (1975) regarding the effect of "panels' decisions":

> ". . . the Cities and Towns . . . remain free to make their own decision as to how they are going to meet such cost, whether by taxation, cut-backs in spending or other means."

Finally, the reasonableness of §23.3 (a-h) in holding down arbitration awards to amounts the City can afford within existing revenue resources is manifest (cf. Faturite Company v. Asbury Park, 318 U.S. 502, 512 (1942).

Equal Protection

Plaintiff argues that §23.3 (a-h) violates the Equal Protection Clauses of the Federal and State Constitutions since (Petition, paragraph 5) "it places plaintiff in a different position than that of any other brother police organization throughout the State of New York" and according to plaintiff it may render the bargaining position of the PBA a nullity.

The Taylor Law in Section 209 specifically provides that its impasse procedures are inapplicable to the fire and police organizations of New York City.

Section 212 of the Taylor Law provides that the local government may adopt its own impasse procedures and pursuant thereto the New York City Collective Bargaining Law was adopted (Admin. Code §1173.4.0). The effect of that legislation is that the PBA is classified with other New York City employee organizations for this purpose.

Since procedures of the NYCCBL are applicable to *all* municipal unions, including the PBA, with limited exceptions, there is no inequality of treatment among the municipal unions.

Appendix C

The equal protection clause does not require absolute symmetry in classification, but all distinctions must be reasonably related to the Legislative objective, (People v. Acme Markets, 37 N Y 2d 326 (1975); Gleason v. Gleason, 26 N Y 2d 28 (1970).)

This Court believes that classification distinctions between New York City and upstate police and firemen and inclusion of the PBA in the NYCCBL are reasonable, that there was more than a minimal rational relationship between the classifications and a legitimate State purpose and that the Equal Protection Clauses are not violated. (Employees Union v. Helsby, 439 F. Supp. 1272, 1277 (S.D. N.Y.) 1977; Buonorata v. Commission of Correction, City of New York, 316 F. Supp. 556, (S.D. N.Y. 1970); Manes v. Golden, 400 F. Supp. 23 (E.D. N.Y.) aff'd 423 U.S. 1068 (1976); Rosenthal v. Harnett, 36 N Y 2d 269.)

Furthermore, Section 23.3 (a-h) applies to all unions with which the City bargains. It does not create any new classification but merely affects the standards which are to be applied uniformly to impasse proceedings.

Plaintiff PBA also argues that the Equal Protection Clauses are violated because those unions failing to reach settlement will find a diminishing share of the municipal budget available to them. There are safeguards to prevent this in §23.3(e) and §23(c). Particularly, §23(c) provides that voluntary wage and benefit agreements shall also be subject to the City's "financial ability to pay", thereby insuring equity and equal protection for all mu-

nicipal unions. (Emphasis added). Plaintiff's argument that the bargaining position of the PBA may be rendered a nullity has not merit and does not warrant discussion.

Section 23.3(a-h) and the Strike Prohibition

PBA contends that §23.3 (a-h) deprives it of arbitration as an available tool in contract negotiations in violation of the Equal Protection Clause and "that by so doing, the balance created by Article 14 of the Civil Service Law [The Taylor Law] is upset and the restrictions on strikes of public employees are similarly removed." (Petition, paragraph 16, 17, 18). The New York State Constitution does not confer upon public employees a constitutional right to collective bargaining. Their right to bargain collectively is merely statutory (Taylor Law, Article 14, §200) and strikes by public employees are banned. The earlier Condon Wadlin Law (Civil Service Law §108, repeal 1967) banned strikes and the present Taylor Law §210 imposes strict penalties for violation of the ban.

In 1974, the Taylor Law (§209.4) provided for binding arbitration when negotiations reach an impasse. Plaintiff's arguments that these amendments were vitiated by §23.3(a-h) thereby "reinstating" the right to strike is meritless. The strike prohibition is not contingent upon procedures employed in the collective bargaining process. (Civil Service Forum v. N.Y.C. Transit Authority, 3 Misc. 2d 346 (Sup. Ct., Kings Co., 1950) aff'd 4 A.D. 2d 117 (1957); Erie County Water Authority v. Kramer, 4 A.D. 2d 545 (1957) aff'd 5 N.Y. 2d 954 (1959).). There can be no tradeoff or "balance" since it is the State's long standing and independent policy to prohibit strikes by public employees.

Home Rule

Plaintiff urges that Chapter 201 contravenes the constitutional home rule provision of Article IX, §2(b)2 of the State Constitution, since it is an act "in relation to the property, affairs or government" of a local government and, therefore, required a request by two-thirds of the members of the Legislature.

The court rejects this argument. A home rule request was not required since Chapter 201 treats matters of substantial and imperative state concern as set forth in the Legislative findings of the 1975 and 1978 Legislation (Adler v. Deegan, 251 N Y 467 (1929). This is true even though as Chief Judge Cardozo said in his concurrence at p. 489, this is a situation "where State and City Concerns overlap and intermingle". (Wambat Realty Corp. v. State, 41 N Y 2d 490 (1977), Board of Education v. City of New York, 41 N Y 2d 535 (1977). Amsterdam v. Helsby, supra).

Actually, in Chapter 201, the Legislature has treated matters of far wider scope than the "property, affairs and government" of local government. Chapter 201, therefore, does not contravene Article IX, Section 2(b)2 of the Constitution.

Conclusion

The motions by defendants are granted to the extent of declaring the challenged legislation to be constitutional. In a declaratory judgment action, the complaint may not be dismissed even though plaintiff is not entitled to the declaration it seeks. (Sweeney v. Cannon, 30 N Y 2d 633, Lanza v. Wagner, 11 N Y 2d 317).

Appendix C

The motion for an injunction is denied.

Settle judgment.

Dated: December 11, 1978

J. S. C.

APPENDIX D

Section 7 of the New York City—Financial Emergency Act

1. In carrying out the purposes of this act,[1] the board shall perform the following functions:

a. In accordance with the provisions of section eight of this act,[2] the board shall (i) consult with the city and the covered organizations in the preparation of the financial plan, and certify to the city the revenue estimates approved therein, (ii) prescribed the form of the financial plan and the supporting information required in connection therewith, and (iii) exercise the rights of approval, disapproval and modification with respect to the financial plan, including but not limited to the revenue estimates contained therein.

b. The board, to the extent it deems it necessary or appropriate in order to accomplish the purposes of this act,[1] shall establish and adopt procedures with respect to the (i) proper maintenance of the board fund, (ii) the deposit and investment of revenues in such fund and (iii) disbursement of monies from such fund.

c. The board shall, from time to time and to the extent it deems necessary or appropriate in order to accomplish the purposes of this act,[1] (i) review the operations, management, efficiency and productivity of such city operations and of such covered organizations or portions thereof as the board may determine, and make reports thereon; (ii) audit compliance with the financial plan in such areas as the board may determine (iii) recommend to the city and the covered organizations such measures relating to their operations, management, efficiency and productivity as it deems appropriate to reduce costs and improve services

so as to advance the purposes of this act;[1] and (iv) obtain information of the financial condition and needs of the city and the covered organizations. Nothing herein shall diminish the powers of the comptroller otherwise provided by law and the board may request the assistance of the comptroller in performing the above functions.

d. The board (i) shall receive from the city and review the report or reports to be prepared on behalf of the city pursuant to section seven-a;[3] (ii) shall receive from the city and the covered organizations and from the special deputy comptroller, and shall review such financial statements and projections, budgetary data and information, and management reports and materials as the board deems necessary or desirable to accomplish the purposes of this act; and (iii) shall inspect, copy and audit such books and records of the city and the covered organizations as the board deems necessary or desirable to accomplish the purposes of this act.[1]

e. All contracts entered into by the city or any covered organization must be consistent with the provisions of this act[1] and must comply with the requirements of the financial plan as approved by the board. With respect to all contracts or other obligations to be entered into by the city or any covered organization after October fifteenth, nineteen hundred seventy-five, requiring the payment of funds or the incurring of costs by the city or any covered organization:

(i) Within twenty days from the effective date of this act the mayor shall present to the board proposed regulations respecting the categories and types of contracts and other obligations required to be reviewed by the board

pursuant to this subdivision e. Within thirty days from the effective date of this act, the board shall approve or modify and approve such proposed regulations or promulgate its own in the event that such proposed regulations are not submitted to it within the twenty days as provided for herein. Such regulations may thereafter be modified by the board from time to time on not less than thirty days notice to the mayor and the mayor may from time to time propose modifications to the board. Unless expressly disapproved or modified by the board within thirty days from the date of submission by the mayor, any such proposed regulations or modifications shall be deemed approved by the board;

(ii) Prior to entering into any contract or other obligations subject to review of the board under its regulations, the city or any covered organization shall submit a copy of such contract or other obligation to the board accompanied by an analysis of the projected costs of such contract or other obligation and a certification that performance thereof will be in accordance with the financial plan, all in such form and with such additional information as the board may prescribe. The board shall promptly review the terms of such contract or other obligation and the supporting information in order to determine compliance with the financial plan;

(iii) During a control period the board shall, by order, disapprove any contract or other obligation reviewed by it only upon a determination that, in its judgment, the performance of such contract or other obligation would be inconsistent with the financial plan and the city or covered organization shall not enter into such contract or other obligation;

(iv) During a control period if the board approves the terms of a reviewed contract or other obligation, the city or covered organization may enter into such contract or other obligation upon the terms submitted to the board. Failure of the board to notify the city or covered organization within thirty days (or such additional time not exceeding thirty days as the board shall have notified the city or covered organization, that it requires to complete its review and analysis) after submission to it of a contract or other obligation that such contract or other obligation has been disapproved shall be deemed to constitute board approval thereof.

f. Upon submission thereof by the city, the board shall review the terms of each proposed long-term and short-term borrowing by the city and any covered organization to be affected during a control period but after October fifteenth, nineteen hundred seventy-five, and no such borrowing shall be made unless approved by the board. Each such proposed borrowing by a covered organization shall be submitted to the city by the covered organization before it may be considered by the board. Not more than thirty days after any such submission by a covered organization the city shall transmit any such proposed terms of borrowing to the board together with the certification of the city as to whether such proposed terms of borrowing are in accordance with the financial plan and are consistent with the objectives and purposes of this Act.[1] Any such submission to the city shall be accompanied by a certification of the covered organization that the terms thereof are in accordance with the financial plan and are consistent with the objectives or purposes of this act. The transmittal by the city to the board shall include a recommendation by the city for the approval or disap-

proval of such proposed terms of borrowing pursuant to the terms of this paragraph. In the event the city does not make such transmittal within such thirty day period, such covered organization may submit such proposed borrowing directly to the board. The board shall disapprove any borrowing if it determines that such borrowing is inconsistent with the financial plan or the objectives or purposes of this act.[1] The board shall consult and coordinate with the municipal assistance corporation for the city of New York with respect to borrowings of the city and any covered organization and shall receive reports from the municipal assistance corporation for the city of New York on its review of borrowings by the city. No covered organizations shall be prohibited from issuing bonds or notes to pay outstanding bonds or notes.

g. The board and the comptroller shall receive quarterly reports from the city comptroller setting forth the debt service requirements on all bonds and notes of the city and the covered organizations for the following quarter, which reports shall be in such form and contain such information as the board shall determine. Such reports shall be issued no later than sixty days prior to the start of the quarter to which they pertain and shall be updated immediately upon each issuance of bonds or notes after the date of such report to reflect any change in debt service requirements as a result of such issuance. The board also shall receive from the city monthly and quarterly financial reports, which reports shall be in such form and contain such information as the board shall determine and shall be made available by the city to the public. In order to avoid duplicative reports and reporting requirements, to the extent that the city is required to submit monthly or quarterly financial reports to the depart-

ment of the treasury pursuant to any agreement or arrangement made in connection with federal guarantees of notes or bonds issued by the city or a state financing agency, copies of such reports shall be submitted to the board in satisfaction of the monthly and quarterly reporting requirements set forth above, together with such additional information as the board may require. Each monthly and quarterly report herein required to be submitted to the board must indicate any variance between actual and budgeted revenues, expenses or cash for the period covered by such report.

h. The board shall issue, to the appropriate officials of the city and the covered organizations, such orders as it deems necessary to accomplish the purposes of this act[1], including but not limited to timely and satisfactory implementation of an approved financial plan. Any order so issued shall be binding upon the official to whom it was issued and failure to comply with such order shall subject the official to the penalties described in section eleven of this act.[4]

i. The board shall coordinate with the municipal assistance corporation for the City of New York and the special deputy comptroller with respect to the performance of its review and monitoring of the revenues and expenditures of the city and the covered organizations.

2. In the event of any default by the city on its outstanding bonds or notes, and so long as such default has not been cured, the board may, any provisions of this act[1] notwithstanding, take any action that it is authorized to take pursuant to title six-A of article two of the local finance law, and may direct the city to take any action that the city is authorized to take under such law.

3. (a) Notwithstanding any provision of the New York City Collective Bargaining Law, codified as chaper fifty-four of the New York city administrative code, or any general or special law to the contrary, any report or recommendation of an impasse panel constituted pursuant to such chapter which provides for an increase in wages or fringe benefits of any employee of the city or covered organization, in addition to considering any standard or factor required to be considered by applicable law, including the standards enumerated in section 1173-7.0(c)(3)(b) of such chapter, shall also take into consideration and accord substantial weight to the financial ability of the city and or covered organization to pay the cost of such increase in wages or fringe benefits.

(b) The board of collective bargaining constituted pursuant to such chapter, when reviewing such report or recommendation before proceeding to other issues, shall make a threshold determination as to whether such report or recommendation for an increase in wages or fringe benefits is within the city's and or covered organization's financial ability to pay. If the threshold determination is in the negative, the matter shall be remitted to the impasse panel for further consideration. If the threshold determination is in the affirmative, the further review of the report or recommendaiton with respect to other issues, if any, shall proceed as provided by law. Unless the parties stipulate otherwise, the threshold determination shall be made within thirty days after submission of the report or recommendation to the board of collective bargaining.

(c) Any determination pursuant to article eight of the labor law or any agreement or stipulation entered into in

lieu thereof which provides for an increase in wages or fringe benefits of any employee of the city or covered organization shall, in addition to considering any standard or factor required to be considered by applicable law, also take into consideration and accord substantial weight to the financial ability of the city and or covered organization to pay the cost of such increase.

(d) Any report or recommendation of a fact finding or similar type panel or any interest arbitration award which provides for an increase in wages or fringe benefits of any employee of the city or covered organization not subject to the provisions of the New York City Collective Bargaining Law, codified as chapter fifty-four of the New York city administrative code, shall, in addition to considering any standard or factor required to be considered by applicable law, also take into consideration and accord substantial weight to the financial ability of the city and or covered organization to pay the cost of such increase.

(e) Any party to a proceeding before the board of collective bargaining as described in paragraph (b) or other body as described in paragraphs (c) or (d) hereof may commence a special proceeding in the appellate division, first department, supreme court, state of New York, to review the threshold determination as to the city and or covered organization's financial ability to pay. Such proceeding shall be commenced not later than thirty days after the final determination has been made by the board of collective bargaining in the case of paragraph (b) or other body in the case of paragraphs (c) or (d). Such proceeding shall have preference over all other causes in such appellate division, other than causes relating to the election law.

(f) The court shall make a de novo review of the record solely for the purpose of determining whether an award of an increase in wages or fringe benefits was within the city's and or covered organization's financial ability to pay. The court's findings as to such issue shall be based upon a preponderance of all the evidence set forth in the record. Unless the parties stipulate otherwise, arguments or submission shall be had within fifteen days after commencement of the special proceeding and the court shall render its decision within fifteen days thereafter. All questions, other than the question relating to the threshold determination, shall be reviewed by the appellate division in the same proceeding in the manner provided by article seventy-five or seventy-eight of the civil practice law and rules as may be appropriate, notwithstanding that the issue would otherwise have been cognizable in the first instance before a special or trial term of the supreme court. If an appeal shall otherwise lie from such determination of the appellate division to the court of appeals, notice of such appeal shall be filed within thirty days after the entry of the final order or judgment of the appellate division if such appeal is of right or within ten days after the entry of an order granting leave to appeal and such appeal shall have preference over all other appeals other than appeals relating to the election law.

(g) At any stage of any proceeding under paragraphs (a), (b), (c), (d) and (e) hereof or any appeal from an order or judgment therefrom, the board may intervene as a party on the issue of the financial ability of the city and or covered organization to pay the cost of an increase in wages or fringe benefits.

(h) For the purposes of this subdvision, financial ability to pay shall mean the financial ability of the city and or

covered organization to pay the cost of any increase in wages or fringe benefits without requiring an increase in the level of city taxes existing at the time of the commencement of a proceeding under paragraph (a), (c) or (d) hereof.

(i) The provisions of this subdivision shall terminate on December thirty-first, nineteen hundred eighty-two.

4. During a control period, except upon approval by the board in accordance with the provisions of paragraph e or f of subdivision one of this section, as the board shall determine, neither the city nor a covered organization shall enter any agreement or other arrangement, whether or not it creates a debt of the city or a covered organization, pursuant to which the revenues or credit of the city may be directly or indirectly pledged, encumbered, committed or promised, contingently or otherwise, for the payment of obligations of a public benefit corporation. Nothing in this subdivision shall limit the right of the city to comply with the provisions of any existing agreement or other arrangement in respect of the obligations of a public benefit corporation.

5. The board may employ such consultants as it may deem necessary to assist it in performing its functions required under this act.[1]

6. The board shall have the authority to make and execute agreements and all other instruments which the board deems necessary for the exercise of its powers and functions including, in connection with any agreement by the federal government or any agency or instrumentality thereof to guarantee the payment of the principal of or

interest on bonds or notes issued by the city or by a state financing agency, to enter into one or more agreements containing terms and conditions required by the secretary of the treasury pursuant to the New York City Loan Guarantee Act of 1978, Public Law 95-339[5] with the federal government or any agency or instrumentality thereof with respect to such guarantee or any matters related thereto and to comply with such terms and conditions.

7. The board may appoint qualified individuals to participate as members of such audit, productivity or similar committees or councils as the city may from time to time establish in consultation with the board. Such individuals, however, shall not be deemed to be officers, employees or agents of the board. The board shall review and report on, not less than annually, the development and implementation of methods for enhancing the productivity of the city's labor force proposed by any such commmittee or council.

L.1975, c. 868, § 2 [§ 7]; amended L.1975, c. 870, §§ 3, 4; L.1978, c. 201, §§ 18-23; L.1978, c. 777, §§ 14-19.

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[1] Sections 5401 to 5420.

[2] Section 5410.

[3] Section 5409.

[4] Section 5416.

[5] Pub.L. 95-339, Aug. 8, 1978, 92 Stat. 460. See 31 U.S.C.A. § 1521 et seq.